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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/584,176

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Babasaheb Bhaskarrao Borse

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EXAMINER

MEHTA, HONG T

ART UNIT

PAPER NUMBER

1794

NOTIFICATION DATE

DELIVERY MODE

02/09/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

nyuspatactions@ladas.com

Office Action Summary	Application No. 10/584,176	Applicant(s) BORSE ET AL.	
	Examiner HONG MEHTA	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 November 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) 8-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>June 23, 2006</u> | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Election/Restrictions

Applicant's election without traverse of Group I, claims 1-7 in the reply filed on December 14, 2009 is acknowledged. Although Applicant states the election is with traverse, because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made

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in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. **Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wuhrmann et al. (US 3,715,216) and in view of Gocho et al. (JP 59075978 A, Abstract), Todd Jr. (US 4,877,635), Hughes et al. (US 4,199,610) and Igoe et al. (Dictionary of Food Ingredients, 2001).**

5. **Regarding claims 1-7**, Wuhrmann et al. discloses a beverage powder composition (col. 1, lines 49-54) comprising of sugar, “sucrose” in amount of 90.75 part (col. 4, line 26); ascorbic acid, “organic acid” in amount of 0.47 part (col. 4, line 29); tricalcium phosphate, "anticaking agent" in amount of 0.39 part (col. 4, line 30). Additionally, Wuhrmann et al. discloses particles “encapsulated flavor”, comprising antioxidant tocopherols being agglomerated together with binder, gum arabic as the encapsulating agent (col. 1, lines 52-54; col. 2, lines 53-57; col. 4, lines 9-24) and a flavoring “extract” in the dry beverage powder (col. 1, line 52; col. 3, lines 1, col. 4, line 50-56).

6. Wuhrmann et al. does not disclose encapsulated rosemary flavor; rosemary extract and sodium benzoate as cited in the instant claims.

7. However, Gocho et al. discloses an spray-dried antioxidant agent comprising rosemary oil in emulsion with gum arabica, dextrin or gelatin. It is considered that Gocho’s antioxidant agent to be "encapsulated rosemary flavor" since Gocho's process, spray-drying and materials, rosemary oil, gum arabia and dextrin are similar to applicant's disclosure on page 6, lines 1-23. Gocho discloses rosemary antioxidant agent are effective in amount of about 0.01% wt. to 2.0% wt. in food (Abstract).

8. Additionally, Todd Jr. discloses rosemary herb extract as flavoring with effective antioxidant properties (col. 4, lines 23-44) in food. Todd Jr. is silent in the amount of rosemary flavoring

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“extract”. However, Hughes et al. discloses dry beverage mix comprising 1% wt. to 10% wt. of a flavorant and acidulant wherein ratio of 2.3 parts flavorant to 0.7 parts of acidulant (col. 3, lines 12, Example I and II); thus Hughes et al. discloses flavorant range in amounts of 0.77% wt. to 7.67% wt. Hughes et al. discloses sodium benzoate as preservative (col. 4, line 62) but is silent on sodium benzoate amount. However, Igoe et al. discloses amount of sodium benzoate in amounts of 0.03% to 0.10% in beverage.

9. It would have been obvious to one of ordinary skill in the art to combine Gocho's rosemary antioxidant agent “encapsulated flavoring” and Todd's rosemary extract in Wuhrmann's beverage powder composition. Gocho and Todd both clearly teach different particle forms, encapsulated and extract of rosemary as food ingredients for its flavor and natural antioxidant properties. It would have been obvious to one of ordinary skill in the art to combine them for their flavor and natural antioxidant effectiveness in food. It would have been obvious to one of ordinary skill in the art to use Gocho's rosemary agent “encapsulated flavor” and Todd's rosemary extract in Wuhrmann's dry beverage composition to enhance a desired nutritional benefit in the beverage upon consumption. Furthermore, it would have been obvious to one of ordinary skill in the art to use the amounts of flavoring and sodium benzoate taught by Hughes and Igoe in Wuhrmann's beverage composition because Hughes and Igoe clearly teaches successful amounts of flavoring and sodium benzoate in a beverage.

10. Additionally, one of ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by Wuhrmann et al. and Bader et al. overlap the instantly claimed proportion and therefore are considered to establish a prima facie case of obviousness.

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Regarding claims 2, 3, and 6, the ranges claimed are slightly outside of the example given by Wuhrmann. Wuhrmann gives only one example of acceptable amounts for these components ,however, it would have been obvious to one of ordinary skill that the amounts of sugar, citric acid, and anti-caking agent may be adjusted based upon the desired flavoring and amount of anti-caking preferred in the final beverage powder. Additionally, the claimed amounts are substantially close to that of the instant claims and one of ordinary skill would have expected compositions that are in such close proportions to those in prior art to be prima facie obvious, and to have same properties (*Titanium Metals Corp.*, 227 USPQ 773 (CA FC 1985)).

11. It would have been obvious to one of ordinary skill in the art to select any portion of the disclosed ranges including the instantly claimed ranges from the ranges disclosed in the prior art reference, particularly in view of the fact that; "The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages", *In re Peterson* 65 USPQ2d 1379 (CAFC 2003). Also, *In re Geisler* 43 USPQ2d 1365 (Fed. Cir. 1997); *In re Woodruff*, 16 USPQ2d 1934 (CCPA 1976); *In re Malagari*, 182 USPQ 549, 553 (CCPA 1974) and MPEP 2144.05.

Conclusion

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HONG MEHTA whose telephone number is (571)270-7093. The examiner can normally be reached on Monday thru Thursday, from 7:30 am to 4:30 pm EST..

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on 571-272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Htm

/Jennifer McNeil/

Supervisory Patent Examiner, Art Unit 1794